UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. KARYN MESSINA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03 CV 0011 (RMC)**
	)	
SUSAN FONTANA, et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Dr. Karyn Messina, an equal business partner with Susan Fontana in a business venture known as Totally Italian, Inc., has sued Ms. Fontana and her attorney, Daniel S. Krakower, as well as Mr. Krakower's law firm, Shulman, Rogers, Gandal, Prody & Ecker, P.A ("Firm"). Dr. Messina claims that Ms. Fontana and Mr. Krakower defamed her in a December 27, 2002 email transmission authored by Ms. Fontana, and in a December 31, 2002 letter sent by Mr. Krakower to Ms. Messina.

Pending before the court is a motion to recuse filed by Dr. Messina, which is opposed by Mr. Krakower and the Firm.

Background

The recusal motion is filed under 28 U.S.C. § 455 and argues that the court's "impartiality may be questioned because of the improper *ex parte* communications with the Court by counsel for Mr. Krakower and his law firm." Motion for Recusation and Disqualification of Judge Collyer at 1 ("Motion"). Specifically, Dr. Messina argues that "the inclusion of scandalous materials regarding the disciplinary problems of counsel for the plaintiff was clearly intended to poison the Court and influence the Court against the plaintiff and her counsel." *Id.*

The motion was prompted by a letter to the court from counsel for Mr. Krakower and the Firm that accompanied a courtesy copy of their motion to dismiss and/or for summary judgment. A copy of the letter, with enclosures, was sent to Sol R. Rosen, counsel for Dr. Messina, at the same time that it was sent to the court. The letter sought an immediate review of this action, arguing that this lawsuit was filed to deprive Ms. Fontana of her counsel of choice in the underlying business dispute with Dr. Messina by creating a conflict of interest between Mr. Krakower and the Firm and Ms. Fontana. It cited *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 596 A.2d 1049 (1991) and FED. R. CIV. P. 11 for the proposition that the suit is improper. Enclosed with the letter was material pulled from the District of Columbia Bar internet site referencing Mr. Rosen's Bar record. No argument about his Bar record was made.[1]

Inasmuch as the letter and its attachments were fully served on opposing counsel, there was no *ex parte* contact with the court. For this reason, and because of the substantive arguments in the letter about handling this case quickly, the letter was treated as a supplemental filing and formally entered in the docket. Counsel could and did respond and object to statements and inferences in the letter.

Analysis

Recusal is appropriate "in any proceeding in which [a judge's] impartiality might reasonably be questioned," 28 U.S.C. §455(a), or in which the judge has a "personal bias or prejudice concerning a party . . . ." 28 U.S.C. §455(b)(1). Dr. Messina explicitly argues that the court's

[1] The resolution of the motion before the court does not convey approval of the manner in which the letter was filed or its attachments. Counsel are both directed to follow the Local Rules of this court in all further proceedings.

impartiality might reasonably be questioned and suggests the possibility of bias or taint because of knowledge of Mr. Rosen's record before the Bar.

I. 28 U.S.C. § 455(a).

The standard under § 455(a) is an objective one so that a judge should recuse herself only if there "is a showing of an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality." *United States v. Heldtl*, 668 F.2d 1238, 1271 (D.C. Cir. 1981). A judge's sworn duty is to judge with fairness and impartiality. Absent a showing otherwise, a judge is presumed to be impartial. *See Cobell v. Norton*, 237 F. Supp. 2d 71, 78 (D.D.C. 2003). Where there is no reasonable basis to question a judge's impartiality, it is improper to recuse. *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991).

In light of the above, a motion to recuse "must be supported by facts which would raise a reasonable inference of lack of impartiality on the part of the judge in the context of the issues presented for . . . consideration." *United States v. Corr*, 434 F. Supp. 408, 413 (S.D.N.Y. 1977); *United States v. Lopez*, 944 F.2d 33, 37 (1st Cir. 1991) (Movant must "'suppl[y] a factual basis for an inference of lack of impartiality.'") (citation omitted). In this context, "[t]o sustain its burden and compel recusal under Section 455(a), the moving party must demonstrate the court's reliance on an 'extrajudicial source' that creates an appearance of partiality or, in rare cases, where no extrajudicial source is involved, the movant must show a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 34 (D.D.C. 2000) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). It is not enough for a litigant to fear that a judge might rule against her, and beliefs or opinions without objective facts are not enough to form a reasonable basis for disqualification. *Gen'l Aviation, Inc. v. Cessna Aircraft*

Co., 915 F.2d 1038, 1043 (6th Cir. 1990); *see also Anderson v. Bradford*, No. 89-2776-LFO, 1990 U.S. Dist. LEXIS 13773 (D.D.C. Oct. 11, 1990) ("Nothing in [§ 455] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial") (quoting S. REP. NO. 93-419, at 5 (1973)).

Dr. Messina has not shown facts that would cause a reasonable person to doubt the court's impartiality, and her motion to recuse under § 455(a) therefore must be denied. Dr. Messina states that she fears she "cannot receive unbiased consideration of her litigation" because her attorney's Bar record has been copied from the web site of the Bar of the District of Columbia and submitted to the court. Motion at 1. However, she has failed to tie her expressed fears, doubts, and concerns about the future of her case before this judge to any substantive facts. She does not state any disagreement with the Bar record itself.[2] Moreover, Mr. Rosen's past history before the Bar is irrelevant to Ms. Messina's claim in this suit against Ms. Fontana, Mr. Krakower and the Firm. Courts reject and ignore irrelevant evidence every day without thinking they must recuse themselves just because they heard it. *See Black v. Kendig*, 227 F. Supp. 2d 153, 155-56 (D.D.C. 2002) ("Judges are presumed to be able to compartmentalize information upon which they can predicate their decisions, and information of which they are otherwise aware, but cannot use as a basis for their decisions."). Any purported partiality or appearance of partiality arising from this evidence is improperly grounded in subjective emotion rather than objective fact.

It is noted in this regard that the letter, which was treated by the court as a supplemental brief and filed as such, requested an early hearing so as to resolve the attorney/client conflict of interest

[2] Whether a true and accurate copy of Mr. Rosen's Bar record could also be "scandalous" as claimed does not need to be resolved for purposes of the motion.

as quickly as possible. This request was certainly legitimate and could have, and should have, been made in the form of a formal motion. While somewhat excited in tone, it contained nothing but the arguments of counsel and reference to public facts. The letter is part of the record and therefore it is not an extrajudicial source that could create an appearance of partiality, nor is it so inflammatory as to make fair judgment impossible.

There is no reason to grant the motion to recuse under § 455(a) because there is no objective basis on which to doubt the impartiality of the court. Both sides have been fully apprised on a timely basis of the positions of the other side and responded to all arguments. Defendants were privileged by the First Amendment to file their pleadings and nothing therein contained was so extreme or extraordinary as to deprive them of that right. Mr. Rosen has had a full opportunity to respond. Dr. Messina's subjective fears do not support recusal.

II. 28 U.S.C. §455(b)(1)

Dr. Messina's affidavit also references her fears that the letter may have prompted actual bias in the court. To justify recusal under § 455(b)(1) the moving party must demonstrate bias or prejudice based upon an extrajudicial source. *See Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also Tripp*, 104 F. Supp. 2d at 34. This bias or prejudice must "result in an opinion on the merits on some basis other than what the judge learned from [her] participation in the case." *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966);

The court concludes that there is no basis for recusal for bias under § 455(b)(1). First, because the court treated the letter as a supplemental brief, there is no extrajudicial source from which prejudice or bias could arise. Second, nothing has happened to date in this case and there is no ruling, hearing or decision outstanding from which bias could be discerned by Dr. Messina.

Third, the assumption that the court would be biased against counsel in this case because of counsel's handling of prior cases for other clients is unsubstantiated. Fourth, the assumption that *any* opinion about counsel – good or bad – necessarily redounds to the merits of a dispute or to a party is factually and legally incorrect. *See In Re Beard*, 811 F.2d 818, 830 (4th Cir. 1987) ("Bias against an attorney is not enough to require disqualification under § 455 unless [the movant] can show that such a controversy would demonstrate a bias against the party itself.").[3] Finally, all parties are strangers to the court and there is no basis to assume the court has a bias for or against any party.

Conclusion

For the reasons stated, the motion for recusation and disqualification [7] is **DENIED**.

SO ORDERED.

/s/
ROSEMARY M. COLLYER
United States District Judge

Date: March 18, 2003

[3] Nothing in the letter addressed any facts going to the merits of this case that were not also addressed in the motion to dismiss or for summary judgment. The letter has been made part of the docket of the court. Its contents do not constitute personal knowledge improperly acquired by the court. *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992).